MINUTES OF
FAUQUIER COUNTY BOARD OF ZONING APPEALS
JANUARY 6, 2005

The Fauquier County Board of Zoning Appeals held its regularly scheduled meeting on Thursday, January 6, 2005, beginning at 2:00 P.M. at the Warren Green Meeting Room, 10 Hotel Street, Warrenton, Virginia. Members present were Mrs. Margaret Mailler, Chairperson; Mr. John Meadows, Vice-Chairperson; Mr. James W. Van Luven; Mr. Maximilian A. Tufts, Jr.; Mrs. Carolyn Bowen; Mr. Roger R. Martella, Jr.; and Mr. Serf Guerra. Also present were Ms. Tracy Gallehr, Acting Deputy County Attorney; Ms. Kimberly Johnson, Zoning Administrator; and Mrs. Debbie Dotson, Office Associate III.

ELECTION OF OFFICERS: Ms. Gallehr asked for nominations for BZA officers for 2005. Mrs. Mailler nominated Mr. Van Luven for Secretary and Mrs. Bowen seconded the nomination. There were no other nominations for the office of Secretary. Mr. Meadows nominated Mrs. Mailler for Vice Chairperson and Mr. Van Luven seconded the nomination. There were no other nominations for the office of Vice Chairperson. Mrs. Mailler nominated Mr. Meadows for the office of Chairperson. Mr. Van Luven seconded the nomination. There were no other nominations. Ms. Gallehr called for the vote on the ballot.

AYES: Mr. Guerra, Mr. Tufts, Mr. Van Luven, Mrs. Mailler, Mr. Meadows, Mrs. Bowen, Mr. Martella

NAYS: None

ABSTAINED: None

MINUTES: On a motion made by Mrs. Bowen and seconded by Mr. Van Luven, the BZA moved to approve the December 2, 2004 minutes.

The motion carried unanimously.

LETTERS OF NOTIFICATION AND PUBLIC NOTICE: Mrs. Dotson read the Public Hearing protocol. Mrs. Johnson stated, that to the best of her knowledge, the cases before the Board of Zoning Appeals for a public hearing had been properly advertised, posted, and letters of notification sent to adjoining property owners.

SPECIAL PERMIT #SPPT05-MA-004, JOHN A. MCINTIRE (OWNER) / WILLIAM MCINTIRE AND JOHN R. MCINTIRE, STILLHOUSE VINEYARDS (APPLICANTS)

Applicants are seeking special permit approval for winery with minor events on the property, PIN #6929-75-3501-000, located at 4366 Stillhouse Road, Marshall District, Hume, Virginia.

Mrs. Johnson stated that a BZA site visit was made earlier that day. She reviewed the staff report, a copy of which is attached to and made a part of the minutes.

Bill McIntire and John McIntire, applicants, appeared representing the application and noted agreement with the staff report except that the winery is located between Hume and Markham. Mr. Bill McIntire asked for approval of the permit and requested that the law be applied evenly to all wineries in Fauquier County.

Mrs. Bowen asked Mr. Bill McIntire about the proposed 9:00 a.m. to 9:00 pm hours which included Sunday, expressing concern about conflicts with church services and funerals. Mrs. Bowen asked if the music would be outside. Mr. McIntire stated that music could be inside or outside, depending on the weather. He stated that the music would be limited to string instruments.

Mr. Meadows asked if there was any one to speak for or against the application.

Karen Henderson, President of the Fauquier County Chamber of Commerce, appeared in favor of the application. She stated small farm winery businesses are an important component of county business, and growing, and that the Chamber is supportive of such businesses.

Ann Whitelaw, parishioner of Leeds Church, appeared opposing the application. She stated concerns with events on Sundays, asking that music be restricted to after church service hours. She also stated concerns with events conflicting with potential funerals.

Mr. Martella asked Ms. Whitelaw about church services and funerals. Mrs. Whitelaw explained that everyone has typically left the church by 1:00 p.m. She noted that there are two cemeteries nearby, one next to the church and another newer cemetery across Route 688, nearer the winery, where most burials take place.

Ellen Ussery, Chapter Leader of the Wesleyen Christ Organization, appeared opposing the application. She stated that she is supportive of agriculture but that amplified music is a different proposition, a concern, and has nothing to do with selling wine.

Brenda Moorman, neighbor, appeared opposing the application. She stated that entertainment and outdoor live or amplified music are not an integral part of making or selling wine. She discussed concerns with traffic and intrusive outdoor amplified music.

Mr. Guerra asked Ms. Moorman how close her residence was to the winery. Ms. Moorman stated that she stated she lived about 6 miles from the winery.

Harvey Ussery, resident of the Village of Hume, appeared opposing the application. He stated concerns with increased traffic, particularly because individuals visiting the winery are not familiar with the narrow winding country roads.

Stuart Kinser, neighbor, appeared opposing the application. She stated concerns about potential disruptions and safety. She raised concerns about potential environmental impacts, and concerns that amplified music, lights, and traffic would severely impact safety, quality of life, and the environment.

Irene Kerns, neighbor across the road, appeared opposing the application. She stated concerns with property values and groundwater quality. She noted the difficulty in enforcing attendee limits. Ms. Kerns asked the BZA to deny the permit with a 24 month waiting period before any reapplication, in order that property evaluations could be conducted along with traffic studies and water and air tests.

John Wilcox, neighbor, appeared opposing the application. He stated concerns related to traffic and safety, noting that the road is very twisted and narrow.

Bill Stribling, neighbor, appeared opposing the application. He stated that there has been very little change in that part of Fauquier County, and that other commercial businesses are going on in the area which do not have to use entertainment, music and events in order to sell products. He stated that a State study was done and recommended that wineries should not be associated with vineyards because the vineyards are too small to produce a good quality of wine. Mr. Stribling noted that wineries already have the ability to have tastings and tours.

Paul Goff, neighbor, appeared opposing the application. He stated that his quality of life has somewhat diminished since the winery started business. He stated concerns with farm equipment running at night, noise from an ice truck running all night, and amplified music.

Ann Stribling, neighbor, appeared opposing the application. She stated that she did not want the BZA to approve a modified application, but rather to deny the application and allow no events. She stated that her research shows that grapes will produce about $5,000/acre per year, a sufficient income without having events.

Lila Layton, neighbor of Oasis Winery, appeared opposing the application. She stated that unwanted noise can cause health problems and animals do not like disturbances. She further stated that amplified music should only be allowed in areas where people expect it and enjoy it and not in a rural area.

Judith Hinsdale, area resident, appeared opposing the application. She stated that she has driven a school bus in Fauquier County for 17 years and knows the county roads in the area well, and they are difficult. She raised the issue of people leaving events that have been drinking.

Lindy Hart, neighbor, appeared opposing the application. She stated concerns with traffic and amplified music.

David Wilson, area resident, appeared opposing the application. He compared growing wheat with growing wine, and stated that growing wheat does not give one the right to pollute the environment with noise, therefore neither should growing wine. He asked the BZA to not grant the special permit with any amplified music.

Mary Painter, neighbor, appeared opposing the application. She stated concerns with the size of the single permanent structure on the property where events will be held indoors relative to the size of structures at other wineries and the size of the proposed events. Ms. Painter raised concerns about an increasing number of events and about impacts on the local roads, noting that with weekend cyclists, the added winery traffic is too much.

William Duvall, neighbor, appeared opposing the application. He noted that tourists visit more than one vineyard thereby creating significant traffic on the routes between vineyards. Mr. Duvall also stated that decibel levels are meaningless in the area, as the geography allows sound to travel.

Madeline Thomas, neighbor, appeared opposing the application. She stated that studies should be done on the effects of amplified music due to the topography.

Mr. Meadows asked if there were any other speakers. In that there were no other speakers, the public hearing was closed.

On a motion made by Mrs. Bowen and seconded by Mr. Van Luven, the BZA moved to defer the decision until the February 3, 2005 meeting.

The motion carried unanimously.

SPECIAL PERMIT #SPPT05-SC-014, JEFFREY D. AND PAMELA L. JENKINS (OWNERS)

Owners are seeking reconsideration of special permit approval to reduce the side yard setback for a proposed barn, PIN #6996-97-5445-000, located at 5456 Old Bust Head Road, Scott District, Broad Run, Virginia.

Mrs. Johnson stated that a BZA site visit was made earlier that day. She reviewed the staff report, a copy of which is attached to and made a part of the minutes.

Pamela Jenkins, owner, appeared representing the application. She noted agreement with the staff report.

Mr. Meadows asked if there were any speakers for or against the application. In that there were no speakers, the public hearing was closed.

On a motion made by Mr. Van Luven and seconded by Mr. Martella, the BZA granted the special permit, after due notice and hearing, as required by Code of Virginia §15.2-2204 and Section 5-009 of the Fauquier County Code, based upon the following Board findings:

1. The proposed use will not adversely affect the use or development of neighboring properties and will not impair the value of nearby land.

2. The proposed use is in accordance with the applicable zoning district regulations and applicable provisions of the Comprehensive Plan.

3. Pedestrian and vehicular traffic generated by the proposed use will not be hazardous or conflict with existing patterns in the neighborhood.

4. Adequate utility, drainage, parking, loading and other facilities are provided to serve the proposed use.

5. Air quality, surface and groundwater quality and quantity will not be degraded or depleted by the proposed use to an extent that would hinder or discourage appropriate development in nearby areas.

6. The proposed use is consistent with the general standards for special permits.

The special permit is granted subject to the following conditions, safeguards, and restrictions upon the proposed uses, as are deemed necessary in the public interest to secure compliance with the provisions of this Ordinance:

1. The barn shall be located 85 feet from both the eastern and western property lines.

The motion carried unanimously.

SPECIAL PERMIT #SPPT05-LE-019, THOMAS J. AND LINDA D. OLIVER (OWNERS)

Owners are seeking special permit approval to operate a small contracting business as a home occupation on the property, PIN #6971-80-6347-000, located at 7313 Opal Road, Lee District, Warrenton, Virginia.

Mrs. Johnson stated the applicant did post by the deadline; therefore, the application could not be heard.

On a motion made by Mr. Tufts and seconded by Mr. Van Luven, the BZA moved to defer the application until the February 3, 2005 hearing.

The motion carried unanimously.

VARIANCE #ZNVA05-MA-001, EDWARD C. AND BETTY I. WHEATON (OWNERS)

Owners are seeking a variance of 21 feet from the side yard setback requirement for a previously constructed building on the property, PIN #6011-73-4195-000, located at 12393 John Marshall Highway, Marshall District, Markham, Virginia.

Mrs. Johnson stated that a BZA site visit was made earlier that day. She reviewed the staff report, a copy of which is attached to and made a part of the minutes.

Betty Wheaton, owner, appeared representing the application. Mrs. Wheaton stated that the structure has no water, heat, or electricity and was built primarily as a sitting area. She stated that to remove this structure would cause an extreme hardship both financially and health-wise.

Mr. Meadows asked if there were any speakers for or against the application.

Tom Brockel, neighbor, appeared opposing the application. Mr. Brockel stated that the structure was an eyesore. He stated that the construction of the structure has been detrimental to the enjoyment of his property and his home.

Mr. Meadows asked if there were any other speakers. In that there were no further speakers, the public hearing closed.

The BZA recessed at 3:33 for 5 minutes. The BZA reconvened at 3:38.

Ms. Gallehr reviewed recent Virginia State Supreme Court decisions which limit the authority of the BZA to grant a variance except where there are no other beneficial uses of the property without the variance. Ms. Gallehr noted that the cases decided by the Supreme Court were similar to this case.

On a motion made by Mr. Tufts and seconded by Mr. Van Luven, the BZA moved to deny the variance, based on the Board's findings, after due notice and hearing, as provided by Section 15.2-2204 of the Code of Virginia:

1. Strict application of the Ordinance would not effectively prohibit or unreasonably restrict the use of the property;

2. The granting of the variance will not alleviate a clearly demonstrable hardship approaching confiscation, and is not distinguished from a special privilege or convenience sought by the applicant.

3. Any hardship or restriction on the use of the property is not by reason of:

    a. the exceptional narrowness, shallowness, size or shape of the property at the time of the effective date of the Ordinance;
    b. exceptional topographic conditions or other extraordinary situation or condition of the property;
    c. exceptional topographic conditions or other extraordinary situation or condition of property immediately adjacent thereto.

4. The variance will not be in harmony with the intended spirit and purpose of the Ordinance, and would not result in substantial justice being done.

5. The strict application of the Ordinance will not produce undue hardship.

6. Such hardship is generally shared by other properties in the same zoning district and the same vicinity, and is of so general and reoccurring a nature as to make reasonably practical the formation of a general regulation to be adopted as an amendment to the Ordinance.

Mr. Meadows asked if there was any discussion.

Mr. Guerra stated for the record that he is concerned about information being provided to the BZA members at the last moment, with not enough time for review. Because late information had been provided on this application, he had been prepared to make a motion to postpone the application. However, in light of the limitations to approval discussed by Ms. Gallehr, he would not make such a motion.

The motion carried unanimously.

APPEAL #ZNAP05-CR-002, A. W. AND WILLIAM C. PATTON (OWNERS) / LEE HOLLANDER (APPLICANT)

Applicant is appealing the Zoning Administrator's decision to categorize the Range 82 use as a Category 5 Education Use (Technical School, Outdoor, Section 3-305.5). Property is identified as PIN #7819-66-3353, located on Midland Road, Cedar Run District, Midland, Virginia.

Mrs. Johnson stated that this application is not a public hearing but a public meeting and she was ready to present her arguments.

Mrs. Johnson, Zoning Administrator, stated that the applicants filed a special use permit application in November 2004 for the Range 82 use. The application described the use as a being firing range to be utilized by U.S. Government agencies and other law enforcement and select security agencies for practice and qualification needs; essentially the firing range would be used by individuals who are required to carry firearms for their positions to meet practice and qualification mandates of various agencies. Mrs. Johnson stated that she made the determination as the Zoning Administrator that the application was not properly filed as a firing range under the Outdoor Recreation category, and that this appeal application challenges that decision.

Mrs. Johnson explained that the question before the BZA today is whether Range 82 can be classified under Section 3-309.3. Mrs. Johnson stated that she had determined that it could not be under the Fauquier County Zoning Ordinance. Mrs. Johnson proceeded to present the rationale for her decision. She stated that she arrived at this determination because the firing range classification in the Zoning Ordinance is grouped under a heading in the Zoning Ordinance called Outdoor Recreation. The structure of the

Ordinance has all use classifications grouped into these broad use categories under Article 3. The use categories were adopted in 1981 by the Board of Supervisors, and these categories are utilized in Section 5 to group and present standards for these uses. She noted that these categories were created in a deliberate fashion as evidenced by Section 5-005, which she read: "For the purpose of applying specific conditions upon certain types of special permit and special exception uses and for allowing such uses to be established only in those zoning districts which are appropriate areas for such uses, all special permit and special exception uses are divided into categories of associated or related uses as hereinafter set forth in this Article 5." Therefore, by the specific terms of the Ordinance, these use categories group like things together. In this case, a review of Category 9: Outdoor Recreation reveals that each use is recreational in character. The firing range use is grouped with other recreational uses such as golf courses, swimming pools, recreation grounds, etc.

The appellant has submitted a written argument and one of the things he argues is that titles are not important in this case. In fact, the cases submitted by the appellant show that titles can be very important; the Courts have ruled on the significance of headlines and titles in determining legislative intent. There are circumstances where titles are less important or not important, and several court cases were presented where this was the case. Most notably, titles in the state code have been added by the code maker and carry less weight. In this case—with respect to the use categories in the Zoning Ordinance--it is clear that the titles have significant meaning because 1) they are part of the Ordinance, they are actually part of the language that the BOS adopted; 2) they are a fundamental part of the structure of the Ordinance, they are not just titles, they are the organizing feature of the ZO in Article 5 and in Article 3; 4) they are explicitly discussed in the section previously read as having meaning; and 5) they clearly do outline the types of uses intended in this category by the BOS. The ultimate conclusion to be reasonably and legally drawn is that the use categories in the ZO have significant meaning. Therefore, when a firing range is listed under a use category of outdoor recreation, one must conclude that the range needs to be recreational to be placed in that category.

Mrs. Johnson went on to present her basis for determining that the Range 82 is not recreational. She noted that recreation is not defined in the ZO or the state code, but that "recreational facility" is defined in the state code to mean "a place, like a bathing beach, swimming pool, park, or playground, where members of the public are entertained and diverted, either by their own activities or by the activities of others." In addition, she noted, that it is established law that where there is no definition in the legislation the courts have held that you utilize the plain meaning of the language. Most of us have used the term recreation in our lives and take it to mean entertainment, diversion, relaxation. It is very evident from the information provided on Range 82 that this is not a recreational range, that you cannot consider it a recreational range under the state code definition for recreational facility or under any common accepted use of the term recreation. The Range is to be used entirely for job related training for law enforcement personnel to meet qualifications to do their job.

Mrs. Johnson went on to describe the basis for concluding Range 82 does fit into the Technical School, outdoor use classification. She read the definition from the Zoning Ordinance: "A technical school in which all or part of this instruction, demonstration, practice and other related activities are conducted." The appellant has argued that this can't be a technical school because no teaching is occurring. The definition for Technical School, outdoor doesn't say that you have to have teaching for it to be a technical school. It says that only part of the instruction, demonstration, practice or related activities must be conducted. The special permit application makes it very clear that what's going on is practicing and qualifying to carry firearms for a job. The use fits the definition. Mrs. Johnson went on to point out that a conclusion that the use must have teaching or instruction to be considered Technical School outdoors would mean that the use is not allowed at all in the County. There is an interpretative rule in the Zoning Ordinance, 2-302.1, which states that a use which is not explicitly listed in the Ordinance is not allowed.

Mrs. Johnson noted that the applicant has argued that her determination violates another interpretative rule of the Ordinance, Section 2-302 2. That rule, to paraphrase, establishes that when a use can fit into two separate classifications, the more specific classification is the classification that applies. This interpretive rule was at issue in the Home Depot case. There, it was determined that Home Depot fit into two different classifications under the Category 12 Commercial Retail use category: the more general "retail sales establishment" and the more specific "building material sales." Therefore, the court ruled the Home Depot store was classified in the Ordinance under the more specific "building material sales." In this case you have a use that does not fit into two classifications. There is no construction of the word recreation that allows this use to be placed under the Outdoor Recreation category. Therefore, this rule is not invoked.

Mrs. Johnson noted one final point. She noted that one of the arguments suggested by the applicant in his written argument was that the Zoning Administrator's determination is somehow absurd, because it treats recreational firing ranges differently from non-recreational ranges. The suggestion is that's crazy. In fact, the Zoning Ordinance does treat recreational ranges differently, and it's not that unusual. The Fairfax County Zoning Ordinance makes such a distinction, as does the state code with respect to noise regulations and sport ranges. Mrs. Johnson stated that more importantly, however, one must keep in mind that the question of reasonableness of the Zoning Ordinance is not a question for the Board of Zoning Appeals. Such a question would be an appeal to the Courts about the validity of the Ordinance. The question is not whether it is reasonable for the Ordinance to make such a distinction; the only question is whether it does make such a distinction.

Mrs. Johnson concluded by restating that the Range 82 is not recreational in character and it is very clear from the structure and the language of the Ordinance that the BOS intended the outdoor recreational use category to pertain to recreational uses. Therefore, in order for the Range 82 to fit into this category it must be recreational, and it is not. She asked the BZA to uphold her determination that the use cannot be categorized under section 3-309.3 of the Ordinance, but rather under 3-305.5.

Mr. Martella asked Ms. Johnson if the applicant, on the application they filed for special permit, were specifically asking for special permit under Category 9 Section 3-309.3 Firing Range, skeet or trapshooting facility (indoor or out). Mrs. Johnson stated yes.

James Downey, attorney, appeared representing the appellant/applicant. Mr. Downey stated that the precise use of language is very important in this case, and that the Zoning Administrator determination and argument utilizes very imprecise language. He stated that the Administrator started with the bizarre statement that the appellant argues that titles are not important. Mr. Downey noted he never made such an argument. No where does he say that titles are not important, but rather he makes very precise statements about catch lines not being used to governing intent. Yes, titles and catch lines are sometimes helpful in ascertaining legislative intent, but are not part of the statue itself and they yield to specific content in determining the meaning of the body of the statute.

Another example of the Administrator's imprecise use of language is the word "teaching." Mrs. Johnson stated the appellant reasons that this use does not fit under Technical School because no teaching takes place on this site. Nowhere in our application and nowhere in the appeal that was submitted has the word "teaching" been used, and this is a critical distinction. I don't say that there is no teaching. There isn't any teaching. That is a fact. That is not the term I used.

Also the Administrator stated that the appellant argued her determination should be overruled because it's absurd, crazy. The words absurd or crazy are not stated anywhere. What I did say was this: "The Administrator is bound to call the more practical interpretation the one that upholds rather than defeats legislative intent." It sounds a little bit like don't follow a result that gets you to a result that the legislature clearly did not intend and that is an absurd result. But I did not say don't follow because it is absurd or that it is crazy. The Administrator's use of language is very imprecise.

The Administrator then went on to say that the problem we have here is that the Ordinance contains two categories: Outdoor Recreation Uses and Educational Uses. The Ordinance does in a way do that. The problem isn't Educational Use being a separate category. The problem is the use of language and the ruling has nothing to do with the word educational use. Teaching is not found in either the Technical School part or the Outdoor Recreation part. If you start mixing teaching with education you are getting into a very imprecise use of language and you end up just where the Administrator did with the wrong result.

Finally, the Administrator stated that the appellant claimed the Administrator did not utilize section 2-302.2; we most certainly do take that position. She paraphrased the section in her presentation. It is a very fundamental rule that you do not paraphrase a statute. And, in particular, you do not paraphrase the very statute that governs how this issue should be resolved. It is fundamental to our case that section 2-302 was not followed. It precisely says "notwithstanding that a given use might be construed to

qualify as a use permitted in a district, if such use has characteristics more similar to or more specific than a particular use listed or defined elsewhere in the Ordinance, then the latter listing or definition shall govern." How does this operate when applied precisely? First of all, she started by saying my ruling is that it is not outdoor recreational and goes through a long process of explaining why that is and she goes on to say that she finds it qualifies under the technical school definition and that is where it goes. In other words she is saying that it might be construed to qualify as a use permitted in that district under outdoor recreation. I am saying that it has characteristics more similar to or specific than that use and therefore the more specific characteristics of firing range govern. I am following the rule that applies to how this should be resolved. Can it be construed to qualify as a technical school? Does the question end there? In other words, if it is a dubious proposition you go to this rule. And if you have to resolve a question like this you go to this rule. Now, she resolved it by not invoking this at all. She just said it is Technical School; I find that is where it goes.

Now, let's assume for a moment that it's dubious. But, let's also not overlook the fact that she is plainly wrong in cutting off the question and saying it is a technical school; therefore, I put it there. First of all, you're harkening back to her loose usage of the term teaching and educational uses. We must look carefully at the definition of technical school. Technical school – a school primarily developed to giving instruction, not training – instruction, not teaching – instruction, not education – instruction, in vocational, professional, musical, dramatic, artistic, dancing, nursing, secretarial, linguistic, scientific, religious or other special subjects. Now, that is the primary reference point. Are we a technical school? You don't get to whether we are an outdoor technical school, because outdoor is a type of technical school. The definition of Outdoor Technical School is a technical school which all or part of this instruction, demonstration, practice and other related activities are conducted. You are not an outdoor technical school unless you are a technical school to start with. That is my basic premise. You must be very careful to decide that correctly to begin with. My position is our application did not contain anything that allowed one to preclude that we provide any instruction. We don't provide any instruction. That's why we are not a technical school. That is why you don't go further and say we are an outdoor Technical School. We are not a technical school at all. We had a special exception application and we decided not to pursue it. We took out all instruction and filed for a special permit as a firing range that provides no instruction; therefore, is not a technical school. So not being a technical school, what are we? If there is a debate about it, how are we going to resolve the debate? The debate says if you might be construed to be a use permitted such as technical school and you might be construed as a firing range and certainly we have the characteristics of a firing range. That is all we are. If we might be construed to qualify as a use permitted as a technical school, if we have characteristics more similar to a firing range or more specific than a school of whatever kind, then the latter listing, the listing we have as firing range shall govern. We have characteristics more specific than a use listed or defined elsewhere. The latter listing is the listing under Category 9 of firing range and that is why we go there. This is the rule the Zoning Administrator did not follow in the Home Depot case and she is not following it here. She chooses to paraphrase it. Educational use is not what technical school really is. It is a very precise definition of something that

provides instruction. The word teaching is not in the Ordinance or anything that we provided. We did say in the application that firearm instructors would be present on the site. Does that mean there will be any instruction? It does not. These types of instructors are there as lifeguards at a swimming pool. They are qualified people. Certified firearms instructors do not necessarily give instruction.

It is germane to look at the letter she wrote. She says the application characterizes the use of the range as being for training. That is the premise of her logic in this letter. For training leads me to the conclusion that you fall within the definition of technical school. Training is not what we represented. There are references to ongoing training, things of that nature. And she goes on to quote from our application about practice and qualification needs, a number of ways that the range is planned and designed to meet specific training needs, practice or qualification specialized in individual practice and qualification. Training is not the same thing as practice. There are two kinds of training: you train to be something (i.e. fireman) that is definitely instruction, learning to do something; or you go down to the gym to do weight training – that is another kind of training – not of the instructional part but more like practice, the upkeep of qualifications. That is the kind of training that we submitted we would be doing. That is the only kind of training you could find from this application. You cannot conclude from that there is instruction going on, you cannot conclude from that there is teaching going on. Her basic premise that you are a technical school is plainly wrong and it is because of her imprecise use of language.

Outdoor recreation is the catch line. The word firing range is found in this Ordinance only there. That is the only category that this use is listed. It is listed under a category that does not fit very well. In my submission, I gave a little footnote that recreation doesn't necessarily mean fun. Recreation could mean to renew or create anew. I think it is a recreational use; it is only such in a rather strained way. It is not critical to the resolution of the problem. The use is listed there. The rule of interpretation governing the resolution of this type of problem says; if it is listed elsewhere and it has specific characteristics more similar to that then that listing governs. This is the logic. The Ordinance does not permit you to say "well, yeah, but, the category is different". No. The Ordinance says the specific characteristics are the things that you have to rely on to resolve the question. You do not go to the catch line. You do not go to some general category. We come to the more practical interpretation of what the laws say. The more practical interpretation is the one that upholds legislative intent. What is the legislative intent? To prohibit the use from this County altogether? That is not a practical interpretation. It is the intent of the Ordinance to say we prohibit this use from Fauquier County? This doesn't follow a clear reading of this Ordinance. This use is really no different from the outdoor recreation use. In fact, it is less impactive. It is a much more controlled use. How can we reasonably conclude that the intent is to prohibit it when Clark Brothers is your typical outdoor recreation firing range? This use will be a much more toned down use. There is no practical difference. There will be no negative result as a result of this interpretation of the Ordinance to say that this application should have been accepted to be heard on its merits according to a correct rendition of the Ordinance.

Following 2-302 and not paraphrasing, you get to this result. I've shown you that the application should be accepted. It is a firing range.

Mr. Martella asked Mr. Downey his position about two uses listed under Category 9 that have instruction provided for those uses. Mr. Martella noted that his impression is that the Board, when they adopted the Ordinance, knew at the time that in the context of the equestrian facility that they were going to explicitly authorize instruction. Virginia Supreme Court law and United States Supreme Court law is clear when a legislative body intends something and explicitly permits something and then doesn't include that permission in other categories it must mean that it didn't intend to do it there because they knew how to permit instructional uses for equestrian facilities but they chose not to in the other categories. This is something I've been puzzling with in my mind and would like to give you an opportunity to respond to that.

Mr. Downey responded that once we look at all of them, you will notice a couple of other things, #1, #2, #4, and #11, most likely involve or include some instruction. But they are not developed to primarily give instruction. A little bit of instruction does not change the use as being a technical school. The fact these uses explicitly recognize or choose not to address the fact that instruction may be going on, seems to indicate to me that a common sense grouping of all these together that none of them are of the character or type of use that you would intend to think of them as technical schools. None of them do. Firing range doesn't say one way or another. A firing range is typically not a technical school either. It is a place where people go to shoot. I asked my clients to tell me where I would go. They told me the NRA has schools, they would offer classroom time, time on a range, and instruction of all kinds designed for a typical person to fire a rifle. The legislature has simply listed firing range on the assumption that it does not involve instruction. Some of these uses do and some don't. I don't know that the legislative intent can be gleaned from this that a firing range that does not involve instruction is intended not to be allowed. It seems to be contrary.

Mr. Guerra left the room. Mr. Meadows instructed Mr. Downey to hold his argument until Mr. Guerra returned to the room. A brief conversation occurred about whether all members intended to vote on the appeal. Mr. Meadows stated he believed all members would vote. Mr. Martella noted they were still on the record and all members were not present.

The BZA recessed at 4:26pm.

The BZA reconvened at 4:33pm, with all members present.

Mr. Meadows asked Mr. Downey to continue. Mr. Downey stated that Category 9 does have some uses that do include some instruction. What does that imply? It implies that for those particular ones, if instruction goes on at the site, it is not going to matter. It is still a recreation use.

Mr. Martella stated that someone could make an argument that the Supervisors knew when and how to permit instruction and when they wanted to they explicitly did it. That must mean that if they didn't permit instruction, it must mean that wasn't part of their intention.

Mr. Downey stated that the Supervisors kept it out of technical school even though it involved instruction. Range 82 does not provide instruction. That is a moot point. Whether you are under outdoor recreation or not is a separate question. But to the extent that we listed you as firing range the fact that you don't provide instruction is perfectly consistent with the way we listed you.

Mr. Martella stated that he thought Ms. Johnson is right that the caption recreational uses is a qualifier. Outdoor recreation qualifies the 19 uses below it just as Agriculture caption qualifies those uses and Public Utilities qualifies those uses. We do have a threshold question whether or not this is outdoor recreation and we have to consider that because if it is not outdoor recreation we don't even get into 1-19 with the exception of 8 and 9 where the Supervisors have specifically said they are going to allow a non-recreation use. We are going to allow instruction in the equestrian use.

Mr. Downey stated that he hasn't totally abandoned the point that the proposed use may be recreation. However, it is not the main path to resolve the question. If you follow the Administrator's logic, the result you will reach is that they will be prohibited from the County because they are not a technical school. If you are going to reach the result that they do not belong in the County that is plainly contrary to the intent. What happened here is that the firing range was not thought through to the degree that it had to be separately stated as distinguished from recreation. Their characteristics, the impacts, the physical conduct of the uses have no substantial difference. The main thing is the effect. A process is prescribed in the Ordinance to make sense of it all. It is not to go out onto a limb of abstruse rules of statutory construction as I think you are doing. You have to follow the Ordinance and do what the Ordinance says is to be done in this situation. That is to go to the listing and the specific characteristics and the possibility that it might qualify one place or the other. The Ordinance makes no reference to resolve this according to a catch line of a category.

Mr. Martella stated that the special permit was a request to fall into 3-309.3. That is the only question we are here to look at and the discussion on technical school is not relevant. Outdoor Recreation qualifies everything below it and let's just assume that you are taking the position that it is recreation. The most relevant definition I've seen is in a Virginia Supreme Court opinion case. There are two reasons that the range does not fall into Section 3-309.3. It is: 1) not open to members of the public, as it is an appointment only facility and 2) it's not something where members of the public would be entertained.

Mr. Downey stated that the application was not filed as a recreational use. It was filed as Category 9 – Firing Range. Category 9 happens to be an outdoor recreational category. I don't see anything in the Ordinance that relates as to whether it has to be open to the public. We did not say it was recreational. We filed as a firing range.

Mr. Martella stated for the record that he understood that it is Mr. Downey's position that it is not recreational. It is your position that the use heading is not controlling. But at the same time, we are required to take an independent look at this and I cannot ignore the fact that it falls within a category that falls under outdoor recreation.

Mr. Downey asked how do you get to the point where your independent look at it allows you to essentially depart from the analytical process that the Ordinance says you are supposed to follow to resolve this question. Section 2-302 that says the latter listing governs. If you follow that rule you get to our result. If you take an independent look at it and say well I'm not going to look at that so much as the category instead of the things the Ordinance says you are supposed to do. That is not taking an independent look at it; that is applying erroneous principal of law.

Mrs. Bowen asked Mr. Downey what other uses under Category 9 he thinks are not recreation.

Mr. Downey replied that he really did not think there are any. This use is under a category that is not a clear cut fit.

Mrs. Bowen noted that a Zoning Ordinance text amendment is allowed, noting an applicant could file to place it in another category if the Ordinance doesn't specifically allow the use. Mr. Downey replied that that is true, but a text amendment places a burden on the applicant.

On a motion made by Mr. Van Luven and seconded by Mr. Tufts, the BZA moved to table the matter until the end of the meeting.

The motion carried unanimously.

SPECIAL PERMIT #SPPT05-SC-020, RAYMOND SCHNEIDER (OWNER) / MICHAEL CATLETT (APPLICANT)

Applicant is seeking special permit approval to operate a professional office of six or less employees for a construction management business on the property, PIN # 6083-87-1272-000, located at 1548 Easton Lane, Scott District, Middleburg, Virginia.

Mrs. Johnson stated that a BZA site visit was made earlier that day. She reviewed the staff report, a copy of which is attached to and made a part of the minutes.

Michael Catlett, applicant, appeared representing the application and asked the BZA to defer the hearing until the next meeting so that he may have the chance to speak with neighbors about some of their concerns.

On a motion made by Mrs. Mailler and seconded by Mr. Tufts, the BZA moved to defer the application until the February 3, 2005 meeting.

The motion carried unanimously.

On a motion made by Mr. Van Luven and seconded by Mr. Tufts, pursuant to Code of Virginia Section 2.2-3711(a)(7), the BZA moved to go into Closed Meeting for the purpose of consultation with legal counsel pertaining to specific legal matters requiring the provision of legal advice by counsel relating to ZNAP05-CR-002.

The motion carried unanimously.

On a motion made by Mr. Van Luven and seconded by Mr. Tufts, the Fauquier County Board of Zoning Appeals, having adjourned into Closed Meeting this day for the purposes stated in the resolution authorizing such Session, does hereby certify that to the best of each member's knowledge (I) only public business matters lawfully exempted from open meeting requirements under the Virginia Freedom of Information Act, and (II) only such public business matters as were identified in the motion by which the Closed Meeting was convened, were heard, discussed or considered in the Closed Meeting.

AYES: Mr. Guerra, Mr. Tufts, Mr. Van Luven, Mr. Meadows, Mrs. Mailler, Mrs. Bowen, Mr. Martella

NAYS: None

ABSTENTION: None

ABSENT: None

Mr. Meadows stated that there was some discussion that your applicant had had with me during adjournment about a Board member discussing Item #6 outside this room earlier today. The discussion that the Board member was having was regarding Item #7 on our agenda, not Item #6, your case. This is for the record.

On a motion made by Mr. Van Luven and seconded by Mrs. Mailler, the BZA affirmed the decision of the Fauquier County Zoning Administrator in Appeal ZNAP05-CR-002 that the proposed Range 82 use as described in the application filed for special permit #SPPT05-CR-017 on November 5, 2004 is not properly classified as a Category 9 Outdoor Recreation Firing Range, skeet or trapshooting facility pursuant to Section 3-309.3.

The motion carried unanimously.

OTHER BUSINESS: Mrs. Bowen asked that the BZA by-laws be distributed next month so that amendments could be made.

ADJOURNMENT: There being no further business before the BZA, the meeting was adjourned at 5:28 P.M.

_____ _____

Mr. John Meadows, Chairperson James W. Van Luven, Secretary

Copies of all files and materials presented to the BZA are attached to and become a part of these minutes. A recording of the meeting is on file for one year.